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CASE No. 14,786.

EXTRACTS FROM THE TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1312.~~ 892

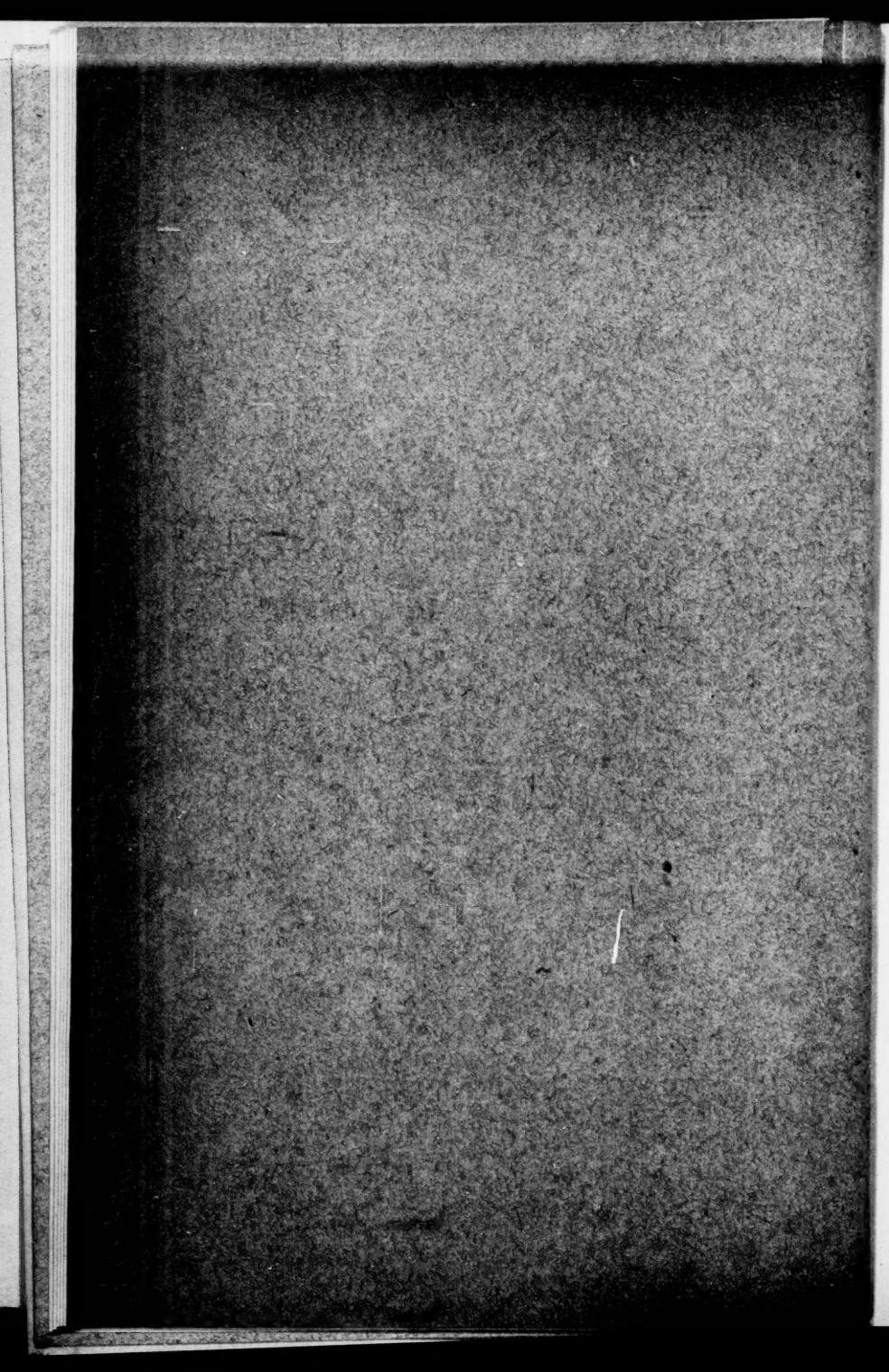
THE CINCINNATI SAFE AND LOCK COMPANY AND G. V. HALLIDAY, PLAINTIFFS IN ERROR,

vs.

THE GRAND RAPIDS SAFETY DEPOSIT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

RECORD FILED JULY 31, 1891.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 12, 1892.

(Record, p. 1 to p. 5.)

* * * * * * *

Be it remembered that heretofore, to wit, on the 26th day of July, in the year of our Lord one thousand eight hundred and ninety, came the plaintiff The Grand Rapids Safety Deposit Co., by its attorneys, and filed in the clerk's office of the court aforesaid the following petition against the defendants herein. Said petition is clothed in the words and figures following, to wit:

THE GRAND RAPIDS SAFETY DEPOSIT CO., Plaintiff,
vs.
THE CINCINNATI SAFE & LOCK CO. and G. V. HALLIDAY, Defendants.
} Petition.

The Grand Rapids Safety Deposit Company is a corporation duly organized, created, and existing under the laws of Michigan and a citizen and resident of the State of Michigan.

The defendant The Cincinnati Safe & Lock Co. is a corporation duly organized, created, and existing under the laws of Ohio and a citizen and resident of the State of Ohio, and the defendant G. V. Halliday is a citizen and resident of the State of Ohio. The citizenship and residence of the aforesaid parties was and has remained the same, respectively, during all the time of the happening of the matters hereinafter mentioned. The matter in dispute in the controversy herein between said plaintiff and said defendants exceeds, exclusive of interests and costs, the sum of five thousand dollars.

In August, 1887, one C. M. Goodrich represented to various persons in Grand Rapids that he was familiar with the business of conducting a safety deposit company and could procure the building of the necessary plant to advantage, and thereby induced fourteen persons to agree with him that they would form an incorporated company for the purpose of conducting the business of a safety deposit company, and could procure the building of the necessary plant to advantage, to have a capital stock of $15,000.00, of which said fourteen persons were each to subscribe for $500.00 worth of stock, making $7,000.00 altogether, and the remaining $8,000.00 were to be taken and held by said Goodrich; said Goodrich represented to his said associates that to buy said plant would cost about $14,500.00; his said associates were entirely ignorant of the value and cost of such plant and relied entirely upon the statements in reference thereto of said Goodrich; thereupon, in reliance upon the representations aforesaid of said Goodrich, on August 16th, 1887, articles of subscription for a safety deposit company, to be thereafter incorporated, were prepared and were subscribed by said fourteen persons, each subscribing for stock to the amount of $500.00, and it was agreed that said Goodrich would take the remainder of said stock, to wit, $8,000 00 in amount; thereupon said Goodrich was authorized to contract on behalf of himself and said associates and said safety deposit company for the necessary plant, and in pursuance thereof said Goodrich executed a contract with the de-

fendant The Cincinnati Safe & Lock Company, on August 20th, 1887, for such plant, which contract recited that the price therefor was $13,000.00, which sum said Goodrich in said written contract agreed and promised "for himself and associates forming the Grand Rapids Fidelity & Trust Savings Company," which was the name by which it was then intended to incorporate this plaintiff, to pay to the Cincinnati Safe & Lock Company; thereupon said Goodrich exhibited said contract to his said associates, who, relying upon the same, proceeded with said Goodrich to procure the incorporation of said company, said Goodrich becoming the subscriber for $8,000.00 of said stock, and said company was thereupon, in October, 1887, duly incorporated with a capital stock of $15,000.00; thereupon, after the incorporation of plaintiff, stock of said company was issued to each of the fourteen persons aforesaid for $500.00, being the amount which each had subscribed and paid in, and paid-up stock to the amount of $8,000.00 was issued to said Goodrich, which said stock was issued to him in consideration of his payment, as was supposed by plaintiff and his associates, of the sum of $8,000.00 to the defendant The Cincinnati Safe & Lock Company on account of the cost of the plant aforesaid; and all the things aforesaid were done by plaintiff in reliance upon the representation made by defendants that the contract price of said plant was $13,000.00. Said Goodrich has since sold all the stock issued to him as aforesaid, but plaintiff says that said Cincinnati Safe & Lock Company, acting through G. V. Halliday, its president, to whom the management of said company's business was entirely entrusted, it and he well knowing that said Goodrich was acting simply as an agent of plaintiff and with the intent to defraud plaintiff, made said written contract, reciting that the purchase price of said plant was $13,000.00 in order that said Goodrich might exhibit said contract to plaintiff and induce plaintiff to believe that such was the purchase price, and at the same time agreed with said Goodrich that the real price to be paid for said plant would be only $7,250.00.

Said plant was furnished by the Cincinnati Safe & Lock Co., and said sum of $7,250.00 was by said Goodrich, as secretary, treasurer, and general manager of plaintiff, to which offices he had been duly elected in December, 1887, paid to and accepted by it in full satisfaction thereof, pursuant to its secret and fraudulent agreement with said Goodrich. In all of the matters aforesaid said Cincinnati Safe and Lock Company acted by and through the said G. V. Halliday, its president.

Wherefore plaintiff prays judgment against said defendants in the sum of $5,750, with interest thereon from January 1st, 1888.

WILBY & WALD,
MONTGOMERY & BUNDY,
Att'ys for Plaintiff.

STATE OF OHIO, }
Hamilton County, } ss:

Gustavus H. Wald, being duly sworn, says that he is one of the

attorneys of the plaintiff above named, a corporation, and that the allegations in the foregoing petition are true, as he verily believes.

GUSTAVUS H. WALD.

Sworn to before me and subscribed in my presence this 25th day of July, 1890.

GEO. H. KATTENHORN,
Notary Public in and for Hamilton Co., Ohio. [SEAL.]

40c. p'd by affiant.

(Record, p. 20 & p. 21.)

* * * * * * *

And afterwards, to wit, on the 25th day of April, A. D. 1891, *the* an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Z, p. 341.

This cause came on to be heard at this term and was argued by counsel upon the motion of defendants to set aside the verdict heretofore returned by the jury herein and for a new trial, and the court, being fully advised, does overrule said motion, and, proceeding to render judgment upon said verdict, it is considered by the court that plaintiff recover of defendants and each of them the sum of five thousand seven hundred and fifty dollars; to all of which defendants and each of them, by their counsel, except.

And afterwards, to wit, on the 19th day of June, A. D. 1891, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Z, p. 358.

Now come the defendants, The Cincinnati Safe and Lock Co. and G. V. Halliday, and present to the court their bill of exceptions in this cause and pray that the same may be allowed, signed, sealed, and made part of the record herein, and the court, finding that *that* the same is true and correct, does allow, sign, and seal the same and orders it to be filed and made part of the record.

And the court allows a writ of error to the Supreme Court of the United States, with stay of execution, upon the filing of a supersedeas bond in the sum of eleven thousand and five hundred ($11,500) dollars, with good and sufficient security, to be approved by the court. The bond, in the event of supersedeas bond being filed, is fixed at $500.00.

And afterwards, to wit, on the 19th day of June, A. D. 1890, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

* * * * * * *

(Record, p. 177 to p. 199.)

* * * * * * *

And afterwards, to wit, on the 20th day of June, A. D. 1891, the following supersedeas bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

THE GRAND RAPIDS SAFETY DEPOSIT CO., Plaintiff,
vs.
THE CINCINNATI SAFE & LOCK CO. and G. V. HALLIDAY, Defendants.

Know all men by these presents that we, The Cincinnati Safe and Lock Co. and G. V. Halliday, as principals, and Joseph Katz, Frederick Pott, Charles H. Candler, Nicholas Blank, Theodore Behringer, Albert Kaiser, Henry Hoppe, Conrad Batzer, and Rochus Bott, are held and firmly bound unto the Grand Rapids Safety Deposit Company in the sum of eleven thousand and five hundred dollars, to be paid to the said The Grand Rapids Safety Deposit Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 20th day of June, 1891.

Whereas the above-named The Cincinnati Safe and Lock Co. and G. V. Halliday have taken out a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Cincinnati Safe and Lock Company and G. V. Halliday shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOS. KATZ. [SEAL.]
FRED. POTT. [SEAL.]
CHAS. H. CANDLER. [SEAL.]
NIK. BLANK. [SEAL.]
THEODORE BEHRINGER. [SEAL.]
ALBERT KAISER. [SEAL.]
HENRY HOPPE. [SEAL.]
CONRAD BAKER. [SEAL.]
ROEHUS BOTT. [SEAL.]

Sealed and delivered in presence of—
ROB'T C. GEORGI.
BOYD E. DILLEY.

The above security is approved.

B. R. COWEN.
GEO. R. SAGE,
U. S. District Judge.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Conrad Baltzer, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth three thousand ($3,000) dollars in real estate in my own name situate in the county of Hamilton, Ohio, in said district.

CONRAD BALTZER.

Sworn to before me the 22d day of June, 1891.

B. E. DILLEY,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Roehus Bott, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

REOHUS BOTT.

Sworn to before me the 20 day of June, 1891.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Charles H. Candler, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five hundred dollars in real estate in my own name situate in the county of Hamilton, in said district.

CHAS. H. CANDLER.

Sworn to before me the 20 day of June, A. D. 1891.

[SEAL.] ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Nicholas Blank, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth fifteen hundred dollars in real estate in my own name situate in the county of Campbell, State of Kentucky.

NIC. BLANK.

Sworn to before me the 20 day of June, 1891.

[SEAL.] ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Theodore Behringer, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth fifteen hundred dollars in real estate in my own name situate in the county of Kenton, State of Kentucky.

THEODOR BEHRINGER.

Sworn to before me the 20 day of June, 1891.

ROB'T C. GEORGI,

[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Henry Hoppe, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth four thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

HENRY HOPPE.

Sworn to before me the 20 day of June, A. D. 1891.

ROB'T C. GEORGI,

[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Joseph Katz, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth three thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

JOS. KATZ.

Sworn to before me the 20 day of June, 1891.

ROB'T C. GEORGI,

[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Frederick Pott, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth three thousand dollars in real estate in my own name situate in the county of —, in said district.

FRED. POTT.

Sworn to before me the 20 day of June, 1891.

ROB'T C. GEORGI,

[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Albert Kaiser, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate in my own name situate in the county of Campbell, State of Kentucky.

— —.

Sworn to before me the 20 day of June, A. D. 1891.

ROB'T C. GEORGI,

[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

And afterwards, to wit, on the 3rd day of July, A. D. 1891, the following petition for allowance of writ of error was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

The Supreme Court of the United States.

THE CINCINNATI SAFE AND LOCK COMPANY and G. V. HALLIDAY, Appellants,
vs.
THE GRAND RAPIDS SAFETY DEPOSIT COMPANY, Appellee.

Petition for Allowance of Writ of Error.

The said The Cincinnati Safe and Lock Company and G. V. Halliday, defendants in the suit of The Grand Rapids Safety Deposit Co. *vs.* The Cincinnati Safe and Lock Company and G. V. Halliday, lately pending in the circuit court of the United States for the southern district of Ohio and western division, conceiving themselves and each of them to have been aggrieved and injured and greatly damaged by the numerous and manifest errors occurring on the trial of said cause, which errors are specifically assigned and set forth in the assignment of errors accompanying this petition, do hereby petition for the allowance of a writ of error for the removal of this cause from said circuit court to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was rendered against these petitioners and in favor of said appellee, duly authenticated, may be taken to the said Supreme Court of the United States.

JOHN F. FOLLETT AND
T. H. KELLY,
Attorneys for Appellants.

The Supreme Court of the United States.

In the Matter of the Petition of THE CINCINNATI SAFE AND LOCK COMPANY and G. V. HALLIDAY, Appellants.

Assignment of Errors.

Afterwards, to wit, on the 3rd day of July, in the year of our Lord eighteen hundred and ninety-one, at the October term for 1890 of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, come the said The Cincinnati Safe and Lock Company and G. V. Halliday, by John F. Follett and Thomas H. Kelley, their attorneys, and say that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. Said court erred in overruling the demurrer of the defend-

ant The Cincinnati Safe and Lock Company to the petition filed herein by said plaintiff.

Second. Said court erred in overruling the demurrer of said defendant, G. V. Halliday, to the said petition of the said plaintiff.

Third. The said court erred in striking out of the answer of the said defendants the following parts thereof, to wit:

"And under the following circumstances, viz: The said C. M. Goodrich, at the date aforesaid, went to the office of the Cincinnati Safe and Lock Company with a letter of introduction from a well-known and reliable business man and an acquaintance of the defendant Halliday, which letter of introduction represented the said Goodrich as a reliable and honest man, who desired to purchase from the defendant The Cincinnati Safe and Lock Company a safety-deposit vault; that thereupon this defendant Halliday and the said Goodrich entered upon negotiations for the furnishing to said Goodrich of a safety-deposit vault, the said Halliday not knowing or supposing that any one but the said Goodrich was interested in such purchase.

This defendant Halliday and said Goodrich, having gone over the entire subject-matter—as to the kind of vault, the kind of materials that should enter into its construction, the mode in which it should be constructed, and all the particulars relating to the construction of said vault—finally agreed upon the price at which said Goodrich should have said vault, the price designated by the defendant Halliday being far below the price usually obtained for such work and far below the actual value of the same, such reduced price having been offered to said Goodrich in view of the fact that these defendants had at that time done but little of said work and were desirous of showing the kind of work they could do, and thus advantageously advertising their business as manufacturers of safe-deposit vaults.

After said Goodrich and these defendants had substantially agreed upon all the details of said contract the defendant G. V. Halliday began to reduce said contract to writing, the said Goodrich copying the same sheet by sheet as it was written, and, shortly before reaching the part of said contract relating to the amount to be paid for said vault, said Goodrich stated to said Halliday that he wanted said amount placed in said contract at thirteen thousand ($13,000) dollars, to which said Halliday replied he could not understand, if that were the case, why he had insisted upon getting him to name a price far below what he, Halliday, had assured him, said Goodrich, was the lowest figure at which such work could be done at a profit and declined to put such amount into the contract as the price of said vault. The said Goodrich stated that he, said Halliday, and the company he represented were not and could not be in any way interested in the price named, provided it were large enough to cover the amount for which they had agreed to build said vault, and that it was no concern of theirs what price was designated, provided they were secured to the amount agreed upon, and did not know of any reason, either legal or moral, why they should not accede to the request of said Goodrich, but, never before having had

such a request made, these defendants declined to put into said contract any consideration other than the real consideration, and thereupon the said Goodrich stated that he would not complete said contract, but would go elsewhere for the purchase of said vault, where he could buy it as he desired, and left the office of these defendants. After he had gone some distance away, being anxious to secure said contract so as to show a specimen of the work of that kind which these defendants could do, followed him out and called him back; that it was customary with these defendants, as with most, if not all, men engaged in like business, as well as those engaged in other manufacturing industries, to sell their manufactured goods at prices far below the schedule rates and to give the purchaser who purchased his goods directly a large margin of profit in the final sale and disposition of the same, and this custom is well known and understood by all dealers and purchasers of such manufactured articles; and, denying all fraud or intent to defraud on the part of the defendants or either of them by reason of any matter alleged in said petition, these defendants aver that the said plaintiff has not suffered any damage whatever by reason of any matter stated truthfully in said petition, and that if he, said Goodrich, defrauded any one it was not the said plaintiff, but only the fourteen (14) persons alleged to have subscribed five hundred ($500) dollars each to the capital stock of said company.

Wherefore these defendants pray to be hence dismissed with their costs, and for all proper relief."

Fourth. In admitting, against the objections of the defendants and each of them, the following part of the deposition of T. Stewart White, to wit:

Q. "To go back to a time prior to the organization of this company, did you have any talk with Mr. Goodrich upon the subject of becoming interested in the safety deposit company here at Grand Rapids?

A. "Yes, sir.

Q. "About what date was it, Mr. White, that you had this talk with Mr. Goodrich?

A. "Well, what talk do you refer to?

Q. "Upon the subject of becoming interested in the company.

A. "It was some time during the late summer or fall of 1887. I think it was in the fall of 1887.

Q. "(Showing witness paper.) I show you a written paper signed by various gentlemen. Whether that refreshes your recollection as to the date when this talk occurred.

A. "Yes, sir; 1887; yes, sir; that is as my recollection.

Q. "About the 16th of August, 1887?

A. "Well, it was somewhere on or about that time. I could not tell whether it was exactly that date or not. I cannot remember.

Q. "What was said by him to you upon the subject of his acquaintance or want of acquaintance with the safety-deposit business?

A. "Why he professed to be th-roughly acquainted with it.

Q. "What, if anything, was said to you upon the subject of what — cost of such a plant as you contemplated putting in would be?

A. "About $14,000.

Q. Whether you signed any agreement upon the subject of your becoming—relating to the subject of your becoming interested in the corporation to be thereafter formed at about that time.

A. I did.

Q. Upon what did you rely in signing that agreement?

A. I relied upon the success of the business, and also upon his competency and honesty and ability to manage it successfully."

Fifth. The said court erred in admitting testimony substantially the same as that hereinbefore set forth of each of the witnesses whose depositions were taken by said plaintiff and read to the jury upon the trial of this cause.

Sixth. The said court erred in admitting testimony offered by said plaintiff and read from the depositions taken by said plaintiff relating to conversations between said Goodrich and the subscribers to the stock, of which representations and conversations the said defendants and each of them were wholly ignorant, and of which conversations and representations neither of said defendants had any notice or information prior to the taking of said deposition.

Seventh. The court erred in admitting, against the objections of the defendant, the paper marked "Exhibit A," attached to the depositions of plaintiff, and also marked "Exhibit A," which paper reads as follows:

We, the undersigned, agree to take the number of shares opposite our respective names, at $100 per share, in a safety deposit and trust company to be situated in the front basement of the Wm. Widdicomb block, corner of Munroe and Watterloo Sts., Grand Rapids, Mich.

The capital stock to be $15,000, divided into 150 shares of $100 each (vaults to cost, complete, with 500 steel boxes, with room for 2,000 boxes, from 14,300 to 14,600 $); to be 12 x 12 ft., inside measurement, and built of 2-in. drill-proof steel and covered on all sides with 2-ft. masonry; the top to be covered with steel railroad rails beside the masonry; the foundation to be solid stone and cement work at least 6 ft. deep, or deeper if necessary to get to solid foundation; to have a steel wicker door, 2½ in. steel inside door and 3½ in. outside door, with time-lock, all to be made and finished in the best manner known for such work; all to be enclosed in a ¾-in. round iron wicket 3 in. apart from floor to ceiling, with handsome wicker gate, all polished; an office for customers by the side of the vault.

No money to be paid until the vaults are all in and complete; then the money for the shares to be due and payable on demand; C. M. Goodrich to guarantee 10% dividend the first year, and to receive no dividend on his stock nor salary for his services until such dividend is earned and paid.

Grand Rapids, Aug. 16, '87.

Names.	No. of shares.	Amount.
Harvey J. Hollister	(5)	$500 00
Lewis H. Withey	(5)	500 00
Henry T. Baker	(5)	500 00
William Dunham	(5)	500 00
Joseph Heald	(5)	500 00
Moreau S. Cosby	(5)	500 00
Wm. Widdicomb	(5)	500 00
C. J. Swensburg	(5)	500 00
Sidney F. Stevens	(5)	500 00
Charles S. Hazeltine	(5)	500 00
Thomas M. Peck	(5)	500 00
Lewis E. Hawkins	(5)	500 00
John Caulfield	(5)	500 00
T. Stewart White	(5)	500 00

Eighth. Said court also erred in admitting in *in* evidence, against the objections of defendants and each of them, the paper marked "Exhibit B," attached to said bill of exceptions.

Ninth. The court also erred in admitting, against the objection of said defendants and each of them, the *the* following questions and answers in the depositions of said witness, T. Stewart White, to wit:

Q. Upon what representation was it that you issued this stock to Mr. Goodrich?

A. On his general representation that the money was needed for the purpose of completing the work and fulfilling their contract, and that he had expended his proportion of it and desired to organize the company and pay the balance of the indebtedness. That was his general representation.

Q. Then the stock was issued in consideration of the moneys that he claimed to have paid on this contract?

A. Yes, sir.

Tenth. The court erred in admitting, against the objection of defendants and each of them, the following part of the redirect examination of the witness, Wm. Dunham, to wit:

Q. On whose behalf did Mr. Goodrich—you said he superintended the putting in of these vaults—on whose behalf did he do that?

A. The company, of course.

Eleventh. The court erred in admitting, against the objection of defendants and each of them, the following question and answer of the witness, S. S. Hazeltine, to wit:

Q. Upon what statement did you rely when you signed this paper

and when you paid your money on this subscription as the cost of the plant?

A. I relied upon Mr. Goodrich's statements.

Twelfth. The court erred in admitting, against the *the* objection of defendants and each of them, the following question and answer of the witness John Caulfield:

Q. At the time you made this subscription or at the time you paid your money into the company on your stock subscription whether you had any knowledge that this contract upon which he had agreed to purchase this vault and equipments was at any other or different price than he claimed.

A. No, sir; I have no knowledge or anything different from what he told me.

Thirteenth. The court also erred in sustaining the objection of plaintiff to the testimony offered by the defendants to prove the allegations of the answer of the defendants, or that part of the same which were stricken out by order of the court on motion of said plaintiff.

The court also erred in sustaining the motion of the plaintiff to direct the jury to return a verdict for the plaintiff and against the defendants and each of them for the sum of five thousand seven hundred and fifty ($5,750) dollars.

15. The court erred in charging the jury as follows:

"Therefore, in the exercise of the duty which the law imposes upon me, I am bound to say that it is your duty to render a verdict against the defendants for the amount claimed."

16. The court also erred in charging the jury as follows:

"Now, gentlemen, with reference to the force and effect of this contract (because I can keep this thing more clearly in your minds and, perhaps, in my own if I refer to the effect of these papers as I proceed) there is a proposition of law that bears directly under what is called the law of notice. It is perfectly clear that every one is chargeable legally with notice of fraud that is brought to his knowledge in direct terms. There is no difficulty in comprehending that or the reason for it. The further proposition is that where there is communicated to a person who has any such relation to the transaction with reference to which the communication refers as to make it his duty to pay attention facts sufficient to put him upon inquiry, he is chargeable with notice of all facts that he might have learned by making inquiry."

17. The court also erred in charging the jury in taking from the jury the question as to whether defendants had notice of facts sufficient to put them upon inquiry of fraud or contemplated fraud upon plaintiff by said Goodrich.

18. The court also erred in charging the jury as follows:

"Therefore the defendant company and Mr. Halliday are both chargeable with a fraud, and I use the term fraud as it is used in the law, and not in the ordinary sense in which we use it in conver-

sation and the consequences thereof which might result to the company."

19. The court also erred in charging the jury as follows:

"The only question is whether there was enough in that paper to amount to notice to Mr. Halliday and to the defendant company, because whatever was notice to him in this transaction was notice to the company of which he is president and general manager; that Mr. Goodrich was acting for somebody else than himself, and I instruct you that there was enough."

20. The court also erred in charging the jury as follows:

"Now, there is a motion before the court to direct a verdict in favor of the plaintiff upon this testimony. It is objected for the defense that such a verdict should not be directed because, in the first place, under the contract of August 16, 1887, the vaults were to cost, completed, from $14,300 to $14,600, and that the cost, as stated to the company and as settled by the company, was $13,000, being less than the smallest figure named. The contention is, therefore, that there has been no misrepresentation, no injury; that the company received exactly what was bargained for in the contract made three days before or the paper signed three days before the making of this contract containing the false statement of the consideration.

I cannot accede to that proposition, gentlemen. There are two or three rules of law as clear as sunlight and so completely applicable that I cannot have any doubt as to what is the proper construction of the facts of this transaction as they appear, and giving to the defendant the benefit of every doubt regarding the facts, as it is my duty to do, in passing upon the motion.

From the paper that was written on the 20 of August, to which I have referred, it is perfectly clear that Mr. Goodrich represented himself to Mr. Halliday as the agent or the associate of the gentlemen at Grand Rapids who were about to form the projected company. It crops out from the other testimony that he, too, was a subscriber and became a stockholder. When he came to Cincinnati he was therefore acting as one of the promoters of this corporation soon to be formed. Well, gentlemen, that is one of the relations in which everybody concerned is bound to the strictest integrity and good faith. The law upon that subject is very clearly laid down. The rules in regard to fairness in representations are to be particularly observed in prospectuses of projected companies. The utmost candor and honesty ought to characterize such public statements. Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will enter into a proposed undertaking and inviting them to take shares upon the faith of the representations therein contained are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares.

If it can be shown that a material representation which is not

true is contained in the prospectus or in any document forming the foundation of the contract between the company and the shareholders, and the latter comes within a reasonable time and under proper circumstances to be released from that contract, the courts are bound to relieve him from it. That is the equitable doctrine.

Now, gentlemen, what is true of a statement in a public prospectus is just as true in reference to a statement made by the originator of a company to those whom he induces to become interested with him in forming it, and therefore when this paper contained this statement (I refer now to the paper dated August 16th, 1887) that the vaults were to cost from $14,300 to $14,600 the gentlemen signing this contract had the right to rely upon that, as they say they did rely upon it, as the statement of the actual cost of those vaults, and they were not bound to give to Mr. Goodrich the benefit of the contract, as they might have been bound to give it to a stranger occupying no fiduciary or confidential relation to them. If Mr. Goodrich had had no connection with those gentlemen; had gone to Grand Rapids and said to them, I will furnish you vaults according to the description contained in this paper at a cost of not less than $14,300 nor more than $14,600, and without making any misrepresentations as to the quality of the vaults or the material, and they had accepted this offer, they would have been bound, notwithstanding he might have succeeded in getting the vaults for $7,250. He would have been entitled under the law, under such circumstances, to all the advantages that he could make without misrepresentation or actual fraud. But when he was acting as agent in projecting a corporation, and then acting for them and for himself in procuring the "plant," as it is called, for that corporation, he was bound to the utmost good faith; and it is a fraud, from the consequences of which he cannot escape, if, having made a contract for his own sum in his own name, on their account, he puts the property into them at another and larger sum; and the rule of damages in such case is the difference between the larger and smaller sums.

There is another rule, gentlemen, that is just as strong—that is, that where one man is acting as agent for another he is bound by the same strict rule of good faith. You send a man out to buy a horse for you or a pair of oxen, and you send him into the next county or to any locality and he buys you the horse or the oxen for $150 and turns him or them over to you for $250 and you find it out, you can recover the difference. It is a fraud. And so in this case it was a fraud on the part of Goodrich—there is no other name for it—to come to Cincinnati to procure the contract for this safe upon precisely the specifications stated for $7,250 and put the safe into his associates at thirteen thousand dollars ($13,000).

That, gentlemen, is the law. Goodrich is not in court. He has disappeared. He is not within the reach of these parties. Everybody who aids or assists in the commission of a fraud consciously is just as guilty as the person who is the prime mover and chief factor—just as guilty.

Now, I am not disposed to believe that Mr. Halliday was deliber-

ately and consciously intending to shield Goodrich or defraud the people at Grand Rapids. I prefer to take the view that he was beguiled by Goodrich into the view which he took of the transaction, but that does not make any difference. We are not dealing with the question of fraud in the moral sense of it.

It is of no consequence in the law whether a man actually thought that he was committing a fraud or not if what he did and did with the knowledge amounted to fraud.

As I said, these papers to which I have referred brought home notice to Mr. Halliday and to the company—because whatever was known to Mr. Halliday was known also in the eye of the law to the company—notice of this fraud; notice that one price was being named in the contract and another price was to be actually paid; that a false price was stated in the bill rendered, and that there was a false credit (this applies, however, only to the company and not to Mr. Halliday); notice also that there was a fraudulent purpose (because it cannot be regarded in any other light), a false credit of five thousand seven hundred and fifty dollars. In all the testimony that has been offered by the defense there is nothing to justify or excuse or exonerate the defendants."

21. The court also erred in refusing to charge the jury, as requested by defendants and each of them, that the measure of damages in this case was the difference in value of the stock which it was alleged had been turned over to C. M. Goodrich in payment if the alleged difference between the cost of the vault as given in the contract and its actual cost, to wit, the sum of $5,750.00; between the actual value of said stock and the value it would have had if the price of the vault had been as represented in said contract.

22. The court also erred in taking from the jury the right to determine the amount of damages, if any, which the plaintiff was entitled to recover of the defendants or either of them.

23. The court also erred in overruling the motion filed by the defendants and each of them herein for a new trial and in entering judgment upon the said verdict of the jury.

Wherefore the said The Cincinnati Safe and Lock Company and G. V. Halliday pray that the judgment of the said circuit court of the United States for the southern district of Ohio and western division be reversed, and that they and each of them be restored to all that they have lost by reason thereof.

JOHN F. FOLLETT,
T. H. KELLEY,
Attorneys for The Cincinnati Safe & Lock Co. and G. V. Halliday, Appellants.

(Record, p. 201, top 203.)

* * * * * * *

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Grand Rapids Safety Deposit Co. and The Cincinnati Safe & Lock Co. and G. V. Halliday, a manifest error hath happened, to the great damage of the said Cincinnati Safe and Lock Co. *et al.*, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 3d day of July, 1891, in the year of our Lord one thousand eight hundred and ninety-one.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

(Endorsed:) United States circuit court, S. D. O., W. D. No. 4354. Grand Rapids Safety Deposit Company *vs.* Cincinnati Safe & Lock Co. Writ of error. Filed ——, 18—. —— ——, clerk.

THE UNITED STATES OF AMERICA, *ss:*

To the Grand Rapids Safety Deposit Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The Cincinnati Safe and Lock Company and G. V. Halliday — plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 3d day of July, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEO. R. SAGE,
U. S. District Judge within and for the Southern District of Ohio, Sitting and Holding Circuit Court for said District, there being no Circuit Judge or Associate Justice in said District.

The Grand Rapids Safety Deposit Company hereby waives service and enters appearance.

GRAND RAPIDS SAFETY DEPOSIT CO.,
By WILBY & WALD, *Its Attorneys.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

Received this writ at Cincinnati, Ohio, on the 3d day of July, A. D. 1891, and at the same time and place the said Grand Rapids Safety Deposit Company, by its attorneys, Wilby and Wald, entered its appearance herein and waived service of process, as will appear by inspection hereof.

JOHN H. SIMMONS,
U. S. Marshal,
By JNO. W. HOOK, *Deputy.*

Two services	4 00
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Endorsed: United States circuit court, S. D. O., W. D. No. 4354. Grand Rapids Safety Deposit Company *vs.* Cin'ti Safe & Lock Co. Citation to defendant in error. Filed ——, 18—. —— ——, clerk.

146 U.S. 554

Office Supreme Court U. S.
FILED.
OCT 8 1892
JAMES H. McKENNEY,
CLERK.

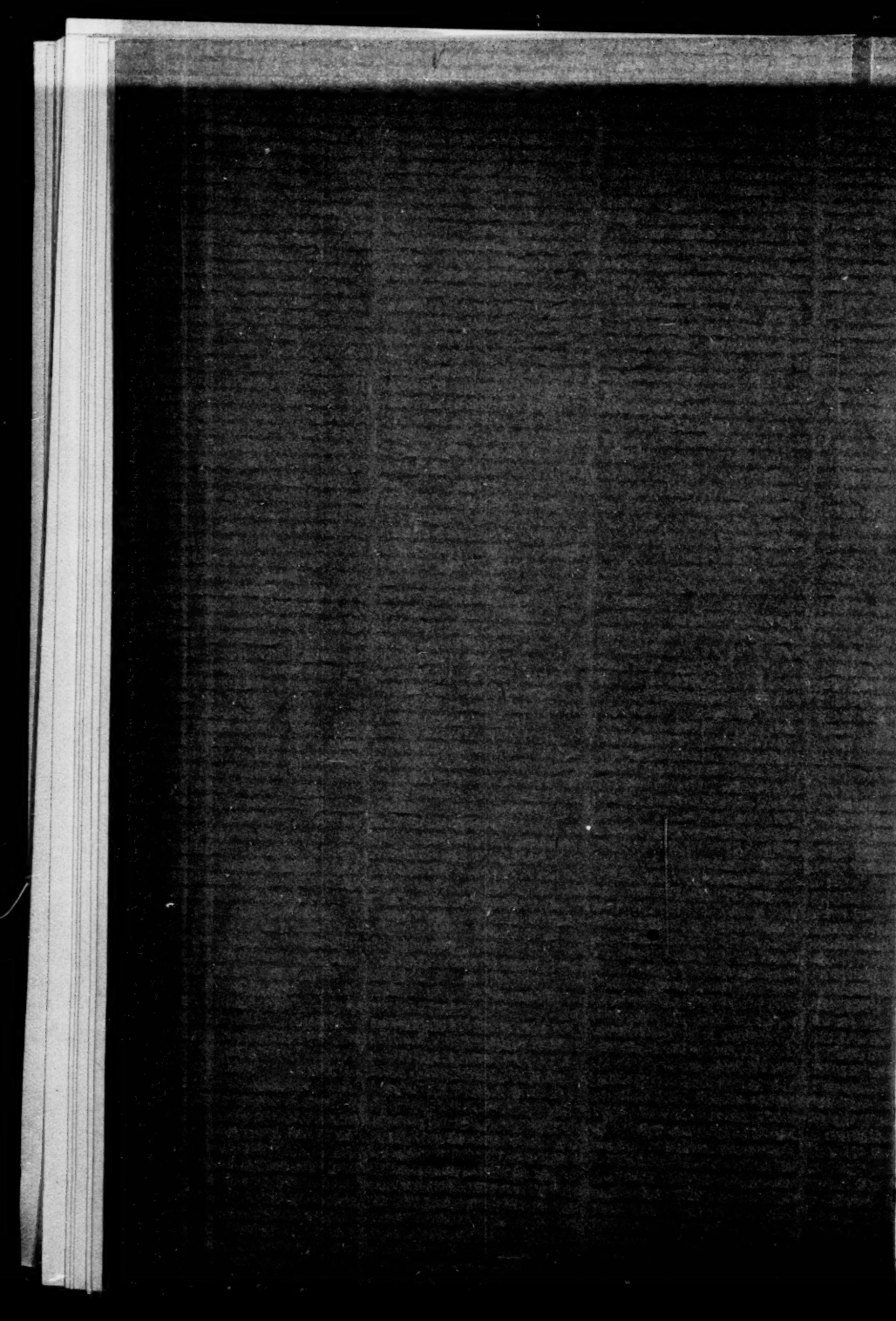
Supreme Court of the United States.

THE CINCINNATI SAFE AND LOCK COMPANY AND G. V. HALLIDAY,
Plaintiffs in Error,
—vs.—
GRAND RAPIDS SAFETY DEPOSIT COMPANY,
Defendant in Error.

No. 14,756.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

JOHN F. FOLLETT,
T. H. KELLEY,
Attorneys for Plaintiffs in Error.



Supreme Court of the United States.

THE CINCINNATI SAFE AND LOCK COMPANY AND G. V. HALLIDAY,
Plaintiffs in Error,
—vs.—
GRAND RAPIDS SAFETY DEPOSIT COMPANY,
Defendant in Error.
No. 14,756.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

That part of the record which has been printed in this case (page 3) shows that the entry was made on the 19th day of June, 1891, allowing the Bill of Exceptions presented by the plaintiffs in error and also the writ of error to this Court with stay of execution upon the filing of a supersedeas bond. Said record also shows (page 4) that the supersedeas bond was filed on the 30th day of June, 1891, which was duly approved.

As decided by this Court in the case of *Draper* v. *Davis* (102 U. S. 370) the allowance of the writ of error and the filing of the supersedeas bond transfer the jurisdiction of the suit to this Court.

By Rule 35 promulgated by this Court November 3, 1890, (137 U. S. 709) a writ of error cannot be allowed until the assignment of errors required by said rule has been filed. The doctrine is also well established in favor of a judgment or any action of a lower court, that the court will presume all things to have been properly done; so that if in this case there should appear any discrepancy between the allowance of the writ of error and the time of such allowance as shown by the Journals of the Court and the filing of the petition for a writ of error with the particular assignments of error the presumption is that the petition and the assignments of error were filed in fact before the allowance of the writ of error. In any event the case is now in this Court upon a writ of error allowed on the 19th day of June, 1891, and a supersedeas bond filed and approved on the 20th of June, 1891, and also upon a petition for a writ of error and the assignment of error as required by the rules of this Court.

The jurisdiction of the Court, we think, is clearly shown by the record, and the case should not be dismissed upon any mere technicality or claimed conflict of dates when the facts upon which the jurisdiction of this Court depends are clearly set forth.

We submit that this case should not be dismissed and that no reason for such dismissal is shown in the brief filed by counsel for defendant in error, and do

not propose to trouble this Court with any further suggestions.

JOHN F. FOLLETT,
T. H. KELLEY,
Attorneys for Plaintiffs in Error.

CINCINNATI, Oct. 1892.

146 U.S. 54

Office Supreme Court U. S.
FILED,
SEP 27 1892
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

NO. 14,786.

THE CINCINNATI SAFE and LOCK CO.
and G. V. HALLIDAY,

PLAINTIFFS IN ERROR.

vs.

THE GRAND RAPIDS SAFETY DEPOSIT CO,

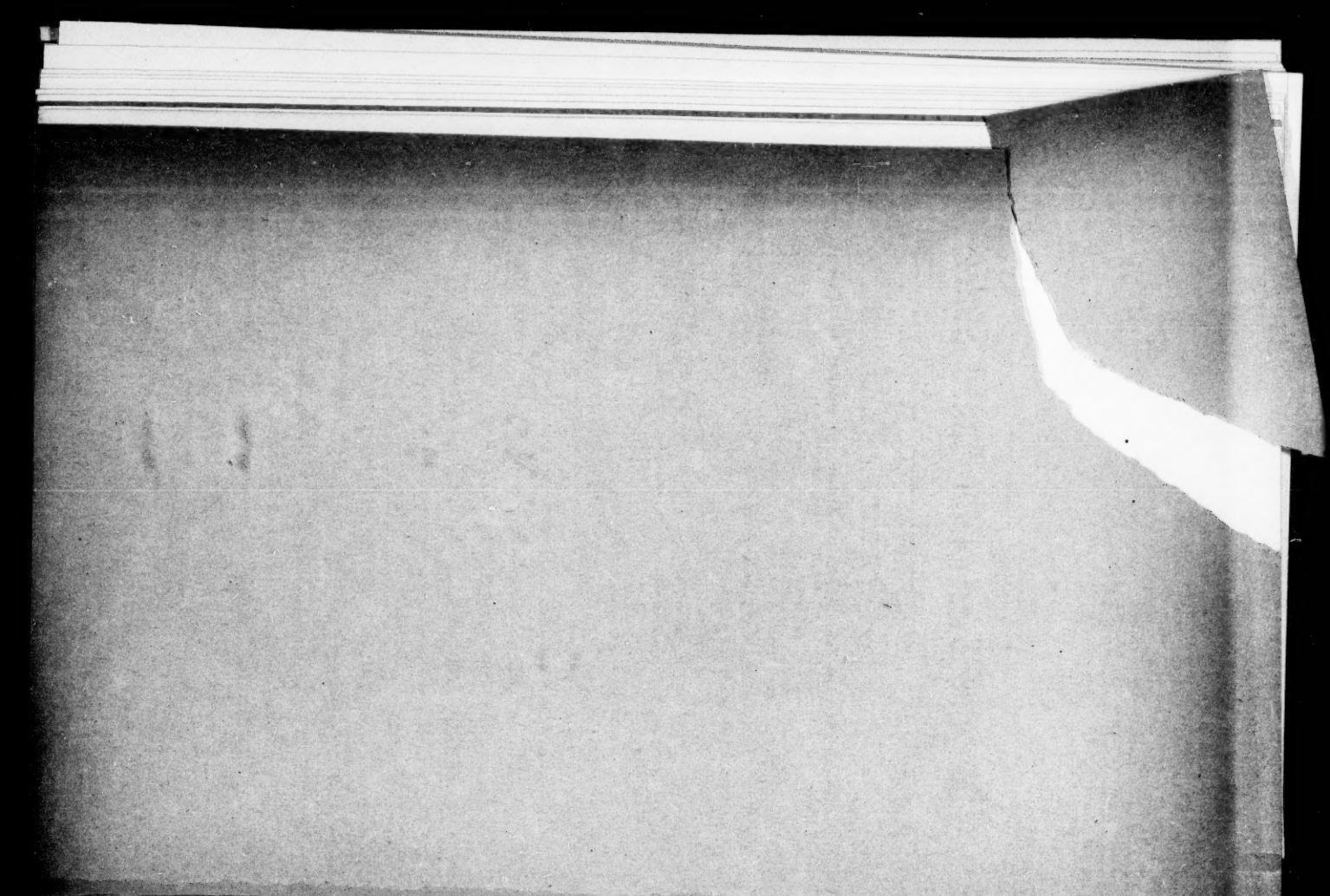
DEFENDANT IN ERROR.

BRIEF

ON BEHALF OF DEFENDANT IN ERROR, ON MOTION TO DISMISS.

CHARLES B. WILBY,
GUSTAVUS H. WALD,
Attorneys for the Grand Rapids Safety Deposit Co.

BULLETIN AND REPORTER PRINT.
CINCINNATI, 1892.



Supreme Court of the United States.

BRIEF

ON BEHALF OF DEFENDANT IN ERROR, ON MOTION TO DISMISS.

THE CINCINNATI SAFE AND LOCK CO. and G. V. HALLIDAY,
Plaintiffs in Error,
vs.
THE GRAND RAPIDS SAFETY DEPOSIT CO.
Defendant in Error.
} Case No. 14786.

Defendant in error has filed a motion to dismiss for want of jurisdiction on the ground that the jurisdiction of the Court below—the Circuit Court of the United States for the Southern District of Ohio, Western Division—depended solely upon the diversity of citizenship of the parties, and the writ of error was not sued out until July 3, 1891.

In *Wauton vs. De Wolf*, 142 U. S. 138, at page 140, this Court said:

> "By the Act of March 3, 1891 (26 Stat. 826 c. 517), "establishing the Circuit Court of Appeals, the juris- "diction of the Court, in cases dependent upon diverse

"citizenship, was taken away; but by the joint resolu-
"tion of March 3, 1891 (26 Stat. 1115), the jurisdiction
"was preserved as to pending cases, and cases wherein
"the writ of error or appeal should be sued out or
"taken before July 1, 1891."

The appeal in that case, having been taken July 27, 1891, this Court held that it had no jurisdiction. The language of the joint resolution of March 3, 1891 (26 Stat. 1115–1116), is as follows:

"And be it further resolved: That nothing in said
"Act shall be held or construed in any wise to impair
"the jurisdiction of the Supreme Court or any Circuit
"Court of the United States in any case now pending
"before it, or in respect of any case wherein the writ of
"error or the appeal shall have been sued out or taken
"to any of said courts before the first day of July,
"anno domini eighteen hundred and ninety-one."

This language of course precludes the idea that jurisdiction in error is preserved to this Court of any case which may, on March 3, 1891, have been pending, not before *it*, but before some other court, unless "the writ of error or the appeal shall have been sued out or taken" before July 1, 1891. The petition (printed Record, pp. 1–2) shows that the action was a case at law, and that the jurisdiction of the court below was solely dependent upon the diverse citizenship of the parties.

The language of the joint resolution "any case wherein the writ of error or the appeal shall have been sued out or

taken" means "any case wherein the writ of error shall have been sued out, or the appeal shall have been taken."

In *Iron Mountain & Helena Railroad vs. Johnson*, 119 U. S. 608, at page 615, this Court said:

> "A supersedeas can not be allowed except as an inci-
> "dent to an *appeal* actually *taken*, or a *writ of error*
> "actually *sued out*."

In *Mussina vs. Cavazos*, 6 Wall. 355, at page 358, this Court said:

> "We have repeatedly held that the writ of error in
> "cases at law is essential to the exercise of the appel-
> "late jurisdiction of this Court."

The only question therefore is whether or no the writ of error in this case was sued out in time; *i. e.*, before July 1, 1891. The printed Record shows (page 7) that on July 3, 1891, plaintiffs in error filed their "Petition for Allowance of Writ of Error." A copy of the writ of error is given on page 16, printed Record; the writ bears *teste* of date of July 3, 1891. On pages 16–17 is a copy of the citation which is tested of the same date. The printed Record (page 3) shows, however, that on June 19, 1891, the following entry was made:

> "Now come the defendants, the Cincinnati Safe and
> "Lock Co. and G. V. Halliday, and present to the Court
> "their bill of exceptions in this cause and pray that
> "the same may be allowed, signed and sealed, and
> "made part of the record herein, and the Court finding
> "that the same is true and correct does allow, sign and

" seal the same and orders it to be filed and made part " of the record.

" And the Court allows a writ of error to the Supreme " Court of the United States, with stay of execution " upon the filing of a supersedeas bond in the sum of " eleven thousand and five hundred ($11,500) dollars, " with good and sufficient surety, to be approved by the " Court. The bond, in the event of a supersedeas bond " being filed, is fixed at $500."

As shown by the printed Record (page 4) a supersedeas bond was filed June 20, 1891.

It may be claimed that this amounted to "suing out the writ of error." The claim is, however, utterly untenable. The "allowance" of a writ of error by the Court below is entirely supererogatory and ineffectual.

In ex parte Virginia Commissioners, 112 U. S. 177, at page 178, this Court said:

" No formal allowance by the Circuit Court of a " writ of error from this Court to review a judgment of " that Court is required. *Davidson vs. Lanier*, 4 Wall. " 453. The writ issues in a proper case as a matter of " right, but, *when sued out* security must be given and a " citation to the adverse party signed."

This is conclusive that an "allowance of the writ" by the Court below is not a "suing out" of the writ: the citation, in the case at bar was signed July 3, 1891. A writ of error is the process, not of the Circuit Court, but of this Court, upon whose authority alone it can issue: No "allow-

ance" of the writ by the Circuit Court can be a "suing out" of the writ from this Court.

In *Brown vs. McConnel*, 124 U. S., 489, at pp, 490–491, this Court said:

> "An appeal to this Court in a proper case is mat-
> "ter of right, and its allowance is in reality nothing
> "more than the doing of those things which are neces-
> "sary to give the appellant the means of invoking our
> "jurisdiction. A writ of error is the process of this
> "Court, and it is issued, therefore, only upon our
> "authority; but an appeal can be taken without any
> "action by this Court."

The Clerk's endorsement (printed Record, p. 16) fails to show the date when the writ of error was actully filed. The fact that the writ bears teste of July 3, 1891, is conclusive that it could not have been filed before July 1, 1891. Out of abundant caution, however, we file, herewith, a certificate of the Clerk of the Circuit Court, stating that the writ was actually filed in that Court July 3, 1891.*

It is submitted that "suing out" a writ of error, has the same meaning as "bringing," or "prosecuting," a writ of error, as those words are used in Sec. 1008 Rev. Statutes;

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* The Clerk explains the absence of the endorsement of date of filing on the original writ by the statement that inasmuch as the original writ is transmitted to this Court, he makes a transcript thereof, upon which he endorses the date of filing of the original. This transcript shows the original to have been filed July 3, 1891.

and this meaning is clearly fixed by frequent decisions of this Court. In the passage above quoted from *Iron Mountain & Helena Railroad vs. Johnson*, 119 U. S. 608, 615, this Conrt seems to have used the words "sued out" in speaking of a writ of error, as the equivalent of the word "brought;" the word then found in the statute. In *Brooks vs. Norris*, 11 How. 204, at pp. 217-8, Chief Justice Taney, delivering the opinion of this Court said:

> "It appears by the record that the judgment was "rendered on the 25th of October, 1843. The writ of "error by which the case is brought here was allowed "by the Chief Justice of the State Court, upon the "petition of the appellant on the 19th of October, 1848, "and the bond also bears date on that day. But the "writ of error was not issued until the 4th of Novem- "ber following. It was issued by the Clerk of the "Court in which the judgment was rendered, and on "the same day, as appears by indorsement upon it, filed "in that office by counsel for the plaintiff in error. More "than five years from the day of the judgment had "therefore elapsed when this writ of error was filed. "The act of 1879, c. 20 Sec. 22, provides that writs of er- "ror shall not be brought but within five years after rend- "ering or passing the judgment or decree complained of. "*The writ of error is not brought, in the legal meaning "of the term until it is filed in the Court which rendered "the judgment. It is the filing of the writ that removes "the record from the inferior to the Appellate Court, and "the period of limitation prescribed by the act of cong- "ress must be calculated accordingly.* The day on

" which the writ may have been issued by the Clerk,
" or the day on which it is tested, are not material
" in deciding the question. In this case, therefore,
" five years had elapsed before the writ of error was
" brought and the limitation of time in the act of con-
" gress was a bar to the writ."

The passage printed above in italics was quoted with approval by this Court in *Mussina vs. Cavazos*, 6 Wall. 355, at page 360; in *Scarbourough vs. Pargoud*, 108 U. S. 567, at page 569; and in *Polleys vs. Black River Co.*, 113 U. S. 81, at page 83.

In the last named case this Court said:

" It is insisted that the writ of error was not brought
" within time. Section 1008 of the Revised Statutes
" declares that " no judgment, decree, or order of a
" Circuit or District Court, in any civil action at law, or
" in equity, shall be reviewed in the Supreme Court, on
" writ of error or appeal, unless the writ of error
" is brought or the appeal is taken within two years
" after the entry of such judgment, decree or order.
" This rule is applicable to writs of error to the State
" Courts in like manner as to Circuit Courts. *Scar-*
" *borough vs. Pargoud*, 108 U. S. 567.

" In the case of *Brooks vs. Norris*, 11 How. 204, con-
" struing the same language in the Judiciary Act of
" 1789, it is said that the writ of error is not brought,
" in the legal meaning of the term, until it is filed in the
" court which rendered the judgment. It is the filing
" of the writ that removes the record from the inferior
" to the appellate court, and the period of limitation

"prescribed by the Act of Congress must be calculated "accordingly. This language is repeated in *Mussina vs.* "*Cavazos*, 6 Wall. 355, and in *Scarbourough vs. Par-* "*goud*, supra.

"Though the writ of error in this case seems to "have been issued by the Clerk of the Circuit Court of "the United States on the 10th day of May, 1884, and "is marked by him for some reason as filed on that day, "it is marked by the Clerk of the Court to which it is "directed, namely, the Circuit Court of LaCrosse Coun- "ty, as filed on the 29th day of that month. It is not dis- "puted that this is the day it was filed in his office. "This must be held to be the day on which the writ of "error was brought.

"The judgment which we are asked to review by this "writ was entered in the Circuit Court of LaCrosse "County, May 24, 1882. It is signed by the Judge on "that day, and it is marked filed on that day over the "signature of the Clerk of that Court. This is the "judgment—the entry of the judgment—and on that "day the plaintiff in error had a right to his writ, and "on that day the two years began to run within which "his right existed. * * * * * * It follows that "the writ of error in this case was brought five days "after the two years allowed by law had expired, and it "must be dismissed."

But whether or not the word "brought" used in Rev. Stat., Section 1008, means precisely the same thing as the words "sued out" used in the joint resolution of March 3, 1891, clear it is that the writ of error in this case was not

"sued out" before July 1, 1891. It was said in *Brown vs. McConnell*, 124 U. S. 489, 490, "a writ of error is the process of this court, and it is issued therefore only upon our authority." The authority of this court was not invoked before July 3, 1891. On that day (printed Record, p. 7) the Petition for Allowance of Writ of Error, entitled in this Court was for the first time filed; and on that day (printed Record, pp. 16, 17,) the writ of error and the citation, bear *teste*. In the absence of a clerical mistake, it is impossible to say that a writ of error was sued out at a time prior to its *teste:* no writ is "sued out" prior to the day of its issue.

Rev. Stat. Section 912, provides that "All process issued from the courts of the United States shall bear *teste* from the day of such issue."

Mr. Tidd, in his work on Practice, p. 1069, (Farrand's Premium Edition, Philadelphia, 1807), says: "The teste of the writ of error is the day of suing it out."

"Sue out" is defined as follows in Black's Law Dictionary: "To *obtain* by application; to petition for and *take out*. Properly the term is applied to the *obtaining* and *issuing* of such process as is only accorded upon an application first made; but conventionally it is also used of the taking out of process which issues of course."

"Burrill's Law Dictionary defines "To Sue Out": "In practice. To *obtain* judicially; to *issue*. Applied